



REPUBLIC OF KENYA



**KENYA LAW**  
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**Midoyo & 29 others v Wairimu & 2 others (Environmental and Land Originating  
Summons 839 of 2014) [2025] KEELC 964 (KLR) (27 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 964 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 839 OF 2014  
OA ANGOTE, J  
FEBRUARY 27, 2025**

**BETWEEN**

**DORICAH MIDEVA MIDOYO & 29 OTHERS & 29 OTHERS & 29  
OTHERS ..... PLAINTIFF**

**AND**

**RUTH WAMBUI WAIRIMU ..... 1<sup>ST</sup> DEFENDANT**

**ANDREW KINYANJUI WAIRIMU ..... 2<sup>ND</sup> DEFENDANT**

**PAULINE WAMAITHA KINYANJUI ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. Before this Court for determination are two applications, being the Plaintiffs' Motion dated 8<sup>th</sup> February, 2024 and the Defendants' Motion dated the 14<sup>th</sup> May, 2024.

**The Plaintiffs' application of 8<sup>th</sup> February, 2024.**

2. This Motion is brought pursuant to the provisions of Article 159 of *the Constitution* of Kenya, Sections 1A, 1B and 3A of the *Civil Procedure Act*, and Order 1 Rule 1o (2) and Order 51 Rule 1 of the Civil Procedure Rules seeking the following reliefs:
  - i. That David Waweru Kinyanjui be enjoined as a party to this suit.
  - ii. That the costs be in the cause.
3. The Motion is based on the grounds on the face thereof and supported by the Affidavit of Salome Kagwiria Gerald, one of the Plaintiffs in the matter, on her own behalf and on behalf of the other Plaintiffs. She deponed that on 27<sup>th</sup> February, 2018, the Intended Interested Party was issued with a grant of probate with written will (P & A 45) with respect to the Estate of Wairimu Kinyanjui(deceased).



4. According to the deponent, she and the other Plaintiffs are creditors to the Estate of the deceased by virtue of being purchasers for value of the portions of land parcel number L.R 6845/124(original number 6845/16/92) from Mathare Kwarahuka Witeithio Investment Limited where the deceased was a Director.
5. It is the Plaintiffs' case that after her death, her co-directors in Mathare Kwarahuka Witeithio Investment Limited caused the entire parcel of L.R 6845/124(original number 6845/16/92) to be transferred into her name and that they have been in actual possession of the said land and have extensively developed the same with permanent commercial and residential buildings.
6. Ms Gerald stated that through their Advocates, they joined the deceased's children into the suit after her demise; that through their Counsel, the children objected to the joinder without disclosing the issue of the will and the subsequent succession cause which had been filed as HCCP & A 536/2020; that on their part, they had filed citation number 1407/017; that the matter was before Muchelule J (as he was then) in HCC P&A 536/2017; that the Judge delivered a Ruling therein rather than in 1407/2017 wherein he directed that they pursue their claim before this court and that the file thereafter went missing for a whole year.
7. The Plaintiffs urged that in view of the foregoing, it is crucial to add David Waweru Kinyanjui as a party to the suit, being the Administrator of the Estate of the late Wairimu Kinyanjui, to enable conclusive determination of the matter.
8. In response to the Motion, the 1<sup>st</sup> Defendant, Ruth Wambui Wairimu, on her own behalf and on behalf of her co-Defendants filed a Replying Affidavit in which she deponed that the Plaintiffs instituted a suit against the late Wairimu Kinyanjui, her mother, after she had begun sub-division of land parcel No 1645/124(Original Number 6845/16/92) which she intended to process titles for the many people she sold to.
9. It was deposed by the Defendants that on 15<sup>th</sup> August, 2015, during the pendency of the suit, their mother who was the Defendant died; that she left behind a written will which she had executed on the 6<sup>th</sup> October, 2011; that a grant of probate was issued on the 27<sup>th</sup> February, 2018 and that after the demise of their mother, the Plaintiffs improperly joined them as Defendants in this suit.
10. It is the Defendants' case that they filed a Motion seeking to have their names struck out of the proceedings which Motion was allowed on the 26<sup>th</sup> July, 2018 and that they were shocked at being served with the present Motion which is incompetent and an abuse of process.
11. She urged that the suit has in any event abated by virtue of Order 24 Rule 4(3) of the Civil Procedure Rules since their deceased mother passed on in 2015 and there is no valid suit before the Court for the substitution of the Defendant; that the Plaintiffs are guilty of inordinate delay having filed this Motion 6 years after the court ordered that the Defendants' names be struck out and that the suit having abated, no Motion can be filed until the suit is revived.
12. The Plaintiffs, through Ms Salome Kagwira Gerald, filed a Further Affidavit on 26<sup>th</sup> July, 2024. She deponed that none of the Defendants has any capacity to respond to this matter not being a party to the proceedings having been struck out on the 26<sup>th</sup> July, 2018 and that the Defendants attempts to re-enter the proceedings without leave of court is irregular and untenable.
13. She stated that pursuant to the grant of probate issued by the Court on the 27<sup>th</sup> February, 2018, Mr David Waweru Kinyanjui is the Administrator of the Estate of the deceased previously represented by the firm of M.W Muli and Co Advocates, which representation was taken over by the firm of Gachie Mwanza and Company Advocates pursuant to the notice of change of 15<sup>th</sup> April, 2024.



14. She opined that the only person who can respond to their averments is David Waweru Kinyanjui, the executor and court appointee; that the Defendants are intent on frustrating their interests and that the Replying Affidavit by the Defendants is frivolous and an outright abuse of the process of the court.

**The Defendants' Motion dated 14<sup>th</sup> May, 2024**

15. This Motion, brought pursuant to the provisions of Sections 1A, 1B and 3A of the *Civil Procedure Act* and Order 24 Rule 4(3) of the Civil Procedure Rules seeks the following reliefs:
- i. That the Honourable Court be pleased to declare that the suit herein has abated by virtue of Order 24 Rule 4(3) of the Civil Procedure Rules and proceed to strike out the same.
  - ii. That the costs of this Application be provided for.
16. The Motion is based on the grounds on the face thereof and sworn by the Affidavit of Ruth Wambui Wairimu, the 1<sup>st</sup> Defendant, of an even date. She deponed that the Plaintiffs instituted a suit against the late Wairimu Kinyanjui who is her mother after she begun sub-division of land parcel L.R. 1645/125(Original Number 6845/16/92) which she intended to process titles for the persons she sold to.
17. According to the 1<sup>st</sup> Defendant, their late mother had initiated the sub-division process by herself with the intention of allotting plots and processing ownership documents to the respective proprietors who had acquired the said plots from her being about 274 in number.
18. She stated that as the sub-division was ongoing, the Plaintiffs instituted a suit seeking to stop the same; that on the 15<sup>th</sup> August, 2015, as the suit was ongoing, their mother died leaving behind a written will executed on the 6<sup>th</sup> October, 2011; that a grant of probate was subsequently issued on the 27<sup>th</sup> February, 2018; that the Plaintiffs erroneously substituted them with their mother despite her having named an executor and that they filed a Motion seeking to be struck out of the proceedings which Motion was granted.
19. She urged that it has been over 9 years since their mother died; that during that time, no proper Motion has been filed by the Plaintiffs to substitute her rendering the suit void in lieu of Order 24 Rule 4(3) of the Civil Procedure Rules and that the Plaintiffs are guilty of inordinate delay in the institution of the present Motion, the same having been brought 6 years since the court ordered that the Defendants' names be struck out from the suit.
20. In response to the Motion, Salome Kagwiria Gerald swore a Replying Affidavit on 10<sup>th</sup> June, 2024. She deponed that she is the 28<sup>th</sup> Plaintiff swearing the same with the authority of the 18 Plaintiffs represented by the firm of M/S Gitonga Muriuki & Co Advocates.
21. She deposed that contrary to the Defendants' assertions, they have made no Motion to join them in this suit contrary to the orders of 26<sup>th</sup> July, 2018 and the same is a creation of M/S Gachie Mwanza who filed a Notice of Change to replace M.W Muli & Co Advocates who presumably was on record for parties who were not on record and that in any event, the suit has not abated as the issue of substitution was first handled by the court[Hon Obaga J]who gave leave and therefore extinguished the issue of abatement of the suit.
22. She urged that the Ruling of Muchelule J directed that the Plaintiffs institute an ELC matter addressing their interest in the suit property, which Ruling was only served upon them on 9<sup>th</sup> November, 2023 and that the suit property is not among the parcels listed in the Estate of the late Wairimu Kinyanjui.
23. The 6<sup>th</sup> Plaintiff filed Grounds of Opposition on the 12<sup>th</sup> June, 2024 premised on the grounds that:



- i. The Application dated the 14<sup>th</sup> May, 2024 is an afterthought upon the filing of the 19 Plaintiffs' Application dated the 8<sup>th</sup> February, 2024 seeking to cure the anomaly.
- ii. The Defendants/Applicants have to no locus to have the matter marked as abated as they are not the Administrators.
- iii. The 6<sup>th</sup> Plaintiff relies on the 19 Plaintiffs replying affidavit sworn by Salome Kagwira Gerald on the 10<sup>th</sup> June, 2024.
- iv. The Application dated 14<sup>th</sup> May, 2024 is an abuse of Court process and should be dismissed with costs.

24. The parties filed submissions and a list of authorities which I have considered.

### **Analysis and Determination**

25. Having considered the applications, affidavits and submissions herein, the issues that arise for determination are:

- i. Whether the Defendants have the requisite locus in these proceedings?
- ii. Whether this suit has abated and if not;
- iii. Whether David Waweru Kinyanjui should be joined into these proceedings?

26. Locus standi is defined in Black's Law Dictionary, 9<sup>th</sup> Edition, as the right to bring an action or to be heard in a given forum. Speaking to the same, the Court in the case of Alfred Njau and Others vs City Council of Nairobi (1982) KAR 229, held as follows:

“The term Locus Standi means a right to appear in Court and conversely to say that a person has no Locus Standi means that he has no right to appear or be heard in such and such proceedings.”

27. It is trite that locus is essential in proceedings. The Court of Appeal in *Kihanya & 4 Others vs Gichuri & another (Civil Appeal 15 of 2019)*[2024] KECA 852 (KLR) (12 July 2024) (Judgment) stated as follows:

“Locus standi is so cardinal in civil proceedings. This is because without locus standi, a party lacks the right to institute and/or maintain the suit even where a valid cause of action subsists. It can be equated to a court acting without jurisdiction. In *Amlers Precedents of Pleadings LexisNexis LTC Harms et al 2018* on page 248 the following is said:

The question of locus standi is in a sense procedural, but it is also a matter of substance. It concerns the sufficiency and directness of a person's interest in the litigation to be accepted as a litigating party. It is also related to the capacity of a person to conclude a jural act. Sufficiency of interest depends on the facts of each case and there are no fixed rules.

The general rule is that it is for the party instituting proceedings to allege and prove his/her locus standi, and the onus of establishing it, rests on that party. It must accordingly appear ex facie from the pleading filed that the parties have the necessary legal standing. Locus standi in iudicio concerns the sufficiency and directness of a litigant's interest in proceedings which warrants his or her title to prosecute the claim asserted, and should be one of the first things to establish in a litigation matter.”



28. The Plaintiffs contend that the Defendants have no locus in these proceedings and consequently their response to the Motion of 8<sup>th</sup> February, 2024, their Motion of 14<sup>th</sup> May, 2024 and all other pleadings in this respect constitute a nullity. This is uncontested by the Defendants. They (the Defendants) conversely plead that the Plaintiffs' Motion is incompetent having cited them when they are not parties to the proceedings.
29. The court has considered the pleadings. Indeed, as stated by both the Plaintiffs and the Defendants, this court [Obaga J] on 26<sup>th</sup> July, 2018 struck out the Defendants from the suit on account of the fact they were improperly substituted in place of the deceased. This is the obtaining position. Ultimately, Ruth Wambui Wairimu, Andrew Kinyanjui Wairimu and Pauline Wamaitha Kinyanjui are not parties to this suit. The Motion of 14<sup>th</sup> May, 2024 and indeed the pleadings by them are unsustainable and constitute a nullity ab initio.
30. While the court has found that the Defendants' Motion seeking to have this court declare that the suit has abated constitutes a nullity, the court is alive to the fact that it must always satisfy itself of its jurisdiction to handle a matter, and can embark upon such a determination suo moto. [see John K. Malembi vs Trufosa Cheredi Mudembei & 2 Others [2019] eKLR.]
31. Indeed, that jurisdiction is central in judicial proceedings is a well settled principle of law. A court acting without jurisdiction is acting in vain. Nyarangi, JA, in Owners of Motor Vessel 'Lillian S' vs Caltex Oil (Kenya) Limited [1989] KLR 1 expressed himself on this issue as follows:
- “Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings...”
32. The law with respect to abatement of suits is to be found in Order 24 of the Civil Procedure Rules. Of relevance herein is Order 24 Rule 4 which provides as follows:
- “4. Procedure in case of death of one of several defendants or of sole defendant [Order 24, rule 4.]
- (1) Where one of two or more defendants dies and the cause of action does not survive or continue against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.
- (2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.”
- (3) Where within one year no application is made under subrule (1), the suit shall abate as against the deceased defendant.
33. In the case of Said Sweilem Gheithan Saanum vs Commissioner of Lands & 5 Others [2015] eKLR, the Court of Appeal explained the provisions of Order 24 of the Civil Procedure Rules thus:
- “the effect of an abated suit is that it ceases to exist in the eye of the law. The abatement takes place on its own force by passage of time, a legal consequence which flows from the omission



to take the necessary steps within one year to implead the legal representative of the deceased Plaintiff.”

34. See also the case of Rebecca Mijide Mungole & Another vs Kenya Power & Lighting Company Ltd & 2 Others 2017 eKLR where the Court of Appeal stated that it is the effluxion of time that causes the suit to abate.
35. The suit was instituted by the Plaintiffs against Ms Wairimu Kinyanjui on the 26<sup>th</sup> June, 2014 where they sought inter-alia a transfer of various portions of the suit property to them. Ms Wairimu Kinyajui passed away on the 15<sup>th</sup> August, 2015 during the pendency of the suit leading to the Plaintiffs seeking to substitute her with her children Ruth Wambui Wairimu, Andrew Kinyanjui Wairimu and Pauline Wamaitha Wairimu.
36. The Plaintiffs’ Motion for substitution aforesaid was allowed. However, on 31<sup>st</sup> August, 2017, the Defendants filed a Motion seeking to be struck out of the proceedings. The same was allowed and they were struck out vide the Ruling of 26<sup>th</sup> July, 2018.
37. It is clear from the foregoing that upon the death of the Defendant, the Plaintiffs did indeed seek her substitution. However, the striking out of the Defendants from the suit, effectively reverted the suit to its previous state—leaving the original Defendant once again unsubstituted.
38. As such, after the striking out of the Defendants on 26<sup>th</sup> July, 2018, time began to run afresh for the Plaintiffs to comply with the mandatory substitution requirements under Order 24 Rule 4. The timeline aforesaid ended in the year 2019 upon which the suit abated.
39. The Plaintiffs have set out a myriad of reasons as to why they delayed in filing the present Motion, which, whilst presented as one for “joinder” clearly seeks to have David Waweru substituted as the legal representative of the deceased.
40. However, it is trite that the abatement of a suit is not subject to judicial discretion, it is an automatic legal consequence triggered by the failure to substitute a deceased defendant within the prescribed period. Contrary to the Plaintiffs’ assertions, this timeline is not dependent on when representation of the Estate is undertaken.
41. As the Motion before the court does not seek the revival of the suit, the court will not venture into a determination of whether the reasons alluded to, resulting in the filing of the Motion at this time are sufficient. The suit having abated, there is nothing before this Court. This includes the Motion for substitution.
42. For those reasons, the court dismisses the Notice Motions dated the 8<sup>th</sup> February, 2024 be and 14<sup>th</sup> May, 2024 with no order as to costs.
43. For avoidance of doubt, the suit is marked as having abated.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 27<sup>TH</sup> DAY OF FEBRUARY, 2025.**

**O. A. ANGOTE**

**JUDGE**

In the presence of;

Mr. Mburu for Gachie for Defendants

Mr. Muriuki for 19<sup>th</sup> Plaintiff



Court Assistant: Tracy

